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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1289

DANIEL MORIN and JANET MORIN,

Petitioners,

—versus—

VICTOR S. GARRA, FELIX H. VANN, and WILLIAM C. SOULE, co-partners,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Respondent's *Brief in Opposition* raises two jurisdictional points which omit a great deal of applicable New Jersey law and necessitate a response.

I.

Compliance with procedural requirements for presenting federal questions before the State Supreme Court.

Respondent does not and could not question the timeliness of Petitioner's *Supplemental Petition for Certification and Supplemental Appendix* before the New Jersey Supreme Court which raised each federal question in a proper way. Nor does Respondent deny that Petitioner's *Memorandum in Opposition of Motion for Judgment*[1] filed in the trial court raised the application of *Griswold* v. *Connecticut*[2] and with it the nuances of the Fourteenth and Ninth Amendments.

Rather, Respondent's Point I-A[3] makes the remarkable assertion that:

> "Our highest Court has stated that it can consider only those questions presented to and passed upon by the Appelalte Division . . . ."

To support this novel view of New Jersey law Respondents rely upon a chattel mortgage suit wherein one party

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[1] *See* Petition for Certiorari, p. 7a.

[2] 381 U.S. 479 (1965).

[3] Brief in Opposition, p. 6.

tried to bring in *new facts* before the New Jersey Supreme Court,[4] and a public employment case involving a newly raised nonconstitutional issue of statutory interpretation.[5] The former decision does not lend itself to discussion, resting as it does upon the Anglo-American concept of appellate review. Nor is the latter relevant, having been decided before the New Jersey Constitution of 1947 placed rule-making power in the State Supreme Court, before the rule amendments of 1953—Rule 1:5-3(c) of which effectively interred the rigidity of *Salisky*,[6] and before a substantial line of authority applying Rule 1:5-3(c) to the kind of question presented here.

Illustrative of New Jersey decisions more nearly in point, and contrary to *Salisky*, are the following, includ-

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[4] *Gibralter Factors Corp.* v. *Slapor*, 23 N. J. 459 [not 454], 129 A. 2d 567, *appeal dismissed*, 355 U.S. 13 (1957):

> "[T]he defendants now tender an *ex parte* 'Supplemental Statement of Facts' . . . This belated tender is, of course, rejected." 23 N. J. at 461, 129 A. 2d at 568.

[5] *Salisky* v. *City of Garfield*, 132 N. J. L. 144, 39 A. 2d 70 (E. & A. 1944) (per curiam).

[6] *See Rules Governing the New Jersey Courts* 63 (1968 ed.). Rule 1:5-3(c) states:

> "The court may notice plain error affecting substantial rights of a party, although they were not brought to the atention of the trial court."

As indicated above, "[t]his rule was adopted in 1953." *In re Howard Johnson, Inc.*, 36 N. J. 443, 445, 177 A. 2d 756, 758 (1962). Point I in the Petition for Certiorari, p. 7a, and Point II, by necesary implication, were indeed raised at the trial level. Point III, *id.* at 24, n. 33, was first raised before the State Supreme Court, resting as it did upon an intervening unreported decision.

ing five in which Associate Justice Brennan of this Court participated. Petitioners respectfully bring these to the Court's attention.

They establish an invariable custom, implementing the rule of practice, that novel questions, not raised below, will be entertained when they "relate to matters of great public concern or important questions of public policy." *Meeker* v. *Meeker*, 52 N. J. 59, 65, 243 A. 2d 801, 804 (1968) (7-0) (constitutional challenge to a rule against attacks on foreign divorces where neither party was a New Jersey resident at the time of the decree).

As the late Chief Justice Vanderbilt stated the principle, for the 1952 New Jersey Supreme Court on which Associate Justice Brennan sat:

> "[It] has been fully briefed and argued here by both sides; and, involving as it does both constitutional issues and important questions of public policy, we deem it our duty in the public interest to decide the matter."[7]

An unbroken line of New Jersey cases carries the policy out to this day. Eight decisions supporting this point are set out in the margin, to mention only those from 1951 on.[8]

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[7] *Fischer* v. *Bedminster*, 11 N. J. 194, 201, 93 A. 2d 378, 381 (1952) (federal due process challenge to zoing law).

[8] *WHYY, Inc.* v. *Glassboro*, 50 N. J. 6, 12, 231 A. 2d 608, 611-12 (1967), *rev'd per curiam on the merits*, 393 U.S. 117 (1968) (discriminatory taxation):

> "As this constitutional contention is one of great concern to many . . . the public interest in this question demands that it be decided."

(*Footnote continued from preceding page*)

(*Footnote continued on following page*)

In re Howard Johnson, Inc., 36 N. J. 443, 445-46, 177 A. 2d 756, 758 (1962) (question of applying tax exemption to property of government lessee):

> "The rule takes a more expansive view of the obligation of a judge. It embraces the philosophy that justice is the common burden of both counsel and the court. . . ."

Donnelly v. *Ritzendollar*, 14 N. J. 96, 101 A. 2d 1, 4 (1953) (Vanderbilt, C. J., concurred in by Brennan, J.) (challenge to chancery jurisdiction of county court):

> "Although this issue was not raised below we consider it here in keeping with our policy to do so where 'the questions raised on appeal . . . are matters of great public concern'."

Solomon v. *Jersey City*, 12 N. J. 379, 386, 97 A. 2d 405, 409 (1953) (concurred in by Brennan, J.) (question of municipal taxing power):

> "This issue is of public concern and will be considered here without regard to the suggested limited nature of the contentions advanced by the plaintiffs in the Law Division."

City of Newark v. *Pulverman*, 12 N. J. 105, 108, 95 A. 2d 889, 890 (1953) (concurred in by Brennan, J.) (federal double jeopardy question):

> "The issue is an important one of public concern and ought to be considered; there is no question of our power to do so."

See also In re Stern, 11 N. J. 584, 590, 95 A. 2d 593, 595-96 (1953) (concurred in by Brennan, J.) (late objection to improper remarks by trial judge to jury); *Morin* v. *Becker*, 6 N. J. 457, 79 A. 2d 29 (1951) (Vanderbilt, C. J.) (civil case challenging majority jury verdict); *Howard* v. *City of Patterson*, 6 N. J. 373, 376, 78 A. 2d 893, 894 (1951) (controversy over salary scale of public employees).

A comparison of the instant case, its parallel precedent from 1967, *Gleitman* v. *Cosgrove*,[9] and application of the aforesaid New Jersey practice rule, requires the conclusion that all federal questions in this case have been decided against Petitioners to date. The Appendix to the Petition reprints the *Gleitman* opinions. A plurality rested its result on "substantial policy reasons,"[10] and "countervailing public policy."[11] The concurrence reached the question of applying the abortion statute, and added that this was a "highly charged public policy area,"[12] involving "the public policy against abortion."[13]

Both dissents also characterized the case as one involving "the policy of our State . . ."[14] Justice Jacobs in dissent saw "no policy favoring the breach of duty here or its immunization . . . ."[15]

All seven New Jersey Supreme Court Justices treated the parallel *Gleitman* case as one concerning, to paraphrase the late Chief Justice Vanderbilt, "important questions of public policy, [which] we deem it our duty in the public interest to decide . . . ."[16]

In light of this declared obligation to decide newly raised questions of important public policy on appeal,

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[9] Appendix to Petition for Certiorari, pp. 8a-56a.

[10] *Id.* at 14a.

[11] *Id.* at 15a.

[12] *Id.* at 26a.

[13] *Id.* at 29a.

[14] *Id.* at 44a.

[15] *Id.* at 40a.

[16] *Fischer* v. *Bedminster*, 11 N. J. 194, 201, 93 A. 2d 378, 381 (1952).

one can conclude without a dram of speculation that here the New Jersey Supreme Court indeed passed upon the federal questions, but rejected them on the authority of *Gleitman,* or on their merits. *Stare decisis* is, of course, one of the more *inadequate* state grounds known to federal jurisprudence. *See. e.g., Loving* v. *Virginia,* 388 U. S. 1, 7 (1967); *Martin* v. *Hunter's Lessee,* 14 U. S. (1 Wheat.) 304 (1816).

In addition, the instant case enjoys a higher posture than many of those cited. Petitioners raised the federal constitutional questions in the trial court where they were decided and rejected.[17] In most of the ten cases cited even this was not done. Moreover, the importance under New Jersey public policy of the issues presented is certified by the State Supreme Court in its earlier parallel case. Third, Respondents can hardly claim prejudice as they have been in possession of the fully presented constitutional issues since receiving the *Supplementary Petition for Certification* timely filed in the New Jersey Supreme Court. Finally, Petitioner's partial reliance on intervening decisions of this and other courts, such as *Levy* v. *Louisiana,*[18] is sufficient in itself to avoid any contention of procedural defect. The petition for rehearing of *Levy* was denied on October 14, 1968, ten days after the decision in the instant case by the Appellate Division. Even more significant is the California decision, *Shively* v. *Board of Medical Examiners,*[19] decided one day prior

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[17] *See* Petition for Certiorari, pp. 6-7.

[18] 391 U.S. 68 (1968). *See* Petition for Certiorari, pp. 6, 13, 22.

[19] No. 590333 (Cal. Super. Ct., San. Fran. Cty., Sept. 24, 1968). *See* Petition for Certiorari, pp. 8, 24.

to argument in the Appellate Division, and as yet unreported. Lastly, a case parallel to our own came down on November 27, 1968, in the New York State Supreme Court.[20] It too could not conceivably have been placed before the Appellate Division.[21]

Whether a state procedural ground may bar review in this Court is, of course, a federal question for decision here, not below. *See, e.g., Parrot* v. *City of Tallahassee*, 381 U. S. 129 (1965) (per curiam); *Douglas* v. *Alabama*, 380 U. S. 415, 422 (1965) (Brennan, J. "[T]he adequacy of state procedural bars to the assertion of federal questions is itself a federal question."); *Staub* v. *City of Baxley*, 355 U. S. 313, 318-19 (1958).

The same standard applies in civil as criminal review, for "grave consequences" are often at stake in both. *Konigsberg (I)* v. *State Bar of California*, 353 U. S. 252, 258 (1957).

Even if one makes the rash assumption that the New Jersey Supreme Court used an arguable procedural defect in this case, which it could not have done consistent with past practice and reasonable expectations, our inquiry does not end. Here, as in *Wright* v. *Georgia*, 373 U. S. 284, 291 (1963), "petitioner[s] could not fairly be deemed to have been apprised. . . . Novelty in procedural requirements cannot be permitted to thwart review in this Court . . .'" *Accord, Barr* v. *City of Columbia*, 378 U. S. 146, 149 (1964) ("[S]tate procedural requirements which are not strictly or regularly followed cannot [preclude] the right to review.").

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[20] *Stewart* v. *Long Island College Hospital*, 58 Misc. 2d 432, 296 N. Y. S. 2d 41 (Sup. Ct., Kings Cty. 1968). *See* Petition for Certiorari, p. 8.

[21] *Cf. O'Connor* v. *Ohio*, 385 U.S. 92 (1966) (per curiam).

The arguments raised in Point I-A of the Brief in Opposition are thus wholly without merit.

II.

Absence of independent and adequate substantive state law ground for decision below.

Respondent further contends by Point I-B[22] that (1) "[t]he majority of the [New Jersey Supreme Court] specifically refused to reach the issue of the criminal statute,"[23] (2) *"Gleitman* was adequately based upon common law principles of tort law . . .",[24] and (3) "damages were [found] impossible of determination."[25] Together these arguments are said to rest the judgment upon independent and adequate state substantive law grounds.

As to (1), a robe-count from one to seven provides a sufficient answer. *Three* justices sought to avoid the statute's relevance and use public policy.[26] A majority of seven however, would appear to be *four*. Justice Francis wrote a concurring opinion, "preferring to deal more specifically with the problem of criminality of a eugenic abortion . . ."[27] He concluded that an abortion under the stated circumstances would have been a crime,"[28] and went

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[22] Brief in Opposition, pp. 8-13.

[23] *Id.* at 13.

[24] *Id.*

[25] *Id.*

[26] Justices Proctor, Hall and Haneman. *See* Appendix to Petition for Certiorari, p. 16a.

[27] *Id.*

[28] *Id.* at 27a.

so far as to extend his ruling to "all of our sister states where preservation of the life of the mother is the only warrant for an induced miscarriage."[29] It is not accurate then to say that a majority avoided the statutory problem, for one member of that majority felt that the policy position could not stand alone. Moreover, the statutory issue must be resolved to establish the legality of the physician's duty. Otherwise, *illegality* would be an independent and adequate bar to review.

The statute's validity is therefore necessarily before this Court.

Contention (2) requires no answer. The common law of torts must yield to the "Constitution, . . . which shall be . .. the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U. S. CONST. Art. 6. Tort law, whether made by judges or legislators, is state law. This is at least the teaching of *Levy* v. *Louisiana,* 391 U. S. 68 (1968), and the host of "loss-of-consortium" decisions typified by *Hitaffer* v. *Argonne Co.,* 183 F. 2d 811 (D. C. Cir.), *cert. denied,* 340 U. S. 852 (1950). The right to recover in tort could hardly be made to depend upon skin color, political belief, religious affiliation, or intention to obtain an abortion in Japan or elsewhere.

Respondent's final contention, (3), is that the State Supreme Court's position on determination of damages forecloses further review. Petitioners maintain that such a holding departs so grossly from the New Jersey common law of torts and malpractice as to constitute a denial of equal protection. If, in *Levy* v. *Louisiana, supra,* the Louisiana courts had determined that links between

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[29] *Id.*

illegitimate children and their natural parents were so speculative as to justify a denial of damages, this Court would surely have taken the further necessary step. In the present case the lower court carved out a new rule on damages to effectuate an attempted double foreclosure of federal rights. Whether this route of circumvention constitutes a denial of equal protection is a substantial federal question. Indeed, Petitioners reiterate that the right to damages for unconstitutional deprivation of state rights must itself be a federal question upon which this Court should pass.

* * *

Petitioners recognize the limited function of a Reply Brief and regret that such length was necessary to clarify the posture of this case.

Respectfully submitted,

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